STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Patrick M. Meter, Colleen A. O'Brien, and Brock A. Swartzle

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

Supreme Court No. 160592

Court of Appeals No. 344715

Circuit Court No. 17-016798-NF

_____/

SECREST WARDLE
NATHAN J. EDMONDS (P 51453)
DREW W. BROADDUS (P 64658)
Attorneys for Plaintiff-Appellant
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966 / Fax (248) 251-1829
dbroaddus@secrestwardle.com

ANSELMI MIERZEJEWSKI RUTH & SOWLE, P.C.
MICHAEL PHILLIPS (P 73280)
Attorney for Defendants-Appellees
1750 S. Telegraph Road, Suite 306
Bloomfield Hills, MI 48302-0179
(248) 338-2290 / Fax (248) 338-4451
mphillips@a-mlaw.com

_____/

PLAINTIFF-APPELLANT ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY'S REPLY TO DEFENDANTS-APPELLEES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

SECREST WARDLE

BY: DREW W. BROADDUS (P 64658)
Attorney for Plaintiff-Appellant Esurance
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966 / FAX (248) 251-1829

Dated: February 27, 2020

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

COURT RULES

ARGUMENT

Plaintiff-Appellant Esurance Property and Casualty Insurance Company ("Esurance") seeks leave to appeal from the Court of Appeals' decision to affirm the Wayne County Circuit Court's dismissal of this equitable subrogation suit. *Esurance v MAIPF,* ___ Mich App ____, ___; ___ NW2d ___ (2019) (Docket No. 344715). (Answer to Application, p iv.) The trial court granted the Motion for Summary Disposition brought by Defendants-Appellees Michigan Assigned Claims Plan and Michigan Automobile Insurance Placement Facility (hereinafter collectively "MAIPF") under MCR 2.116(C)(8). (Answer to Application, p v.) MAIPF argues that this Court should not review the case because the issues presented "will not have an impact on many cases," and because the lower court's rulings were correct. (Id., p iv.)[1]

Contrary to the MAIPF's assertion, the Court of Appeals' holding here *will* "have an impact on many cases," because the panel's reasoning threatens to undermine the very use of equitable subrogation in the no-fault context. Equitable subrogation plays a critical role in furthering "the no-fault act's purpose of providing assured, adequate, and prompt recovery…." *St John Macomb-Oakland Hosp v State Farm Mut Auto Ins Co,* 318 Mich App 256, 267; 896 NW2d 85 (2016). For decades the Court of Appeals has directed no-fault carriers to pay claims first and sort out priority issues between carriers later – with the assurance that erroneous payments could be recovered from a higher-in-priority carrier through equitable subrogation. See *Allstate Ins Co v Citizens Ins Co of Am,* 118 Mich App 594, 603-604; 325 NW2d 505 (1982)

[1] Since Esurance filed its Application, the Court of Appeals definitively ruled that a "plaintiff may seek PIP benefits from MAIPF directly where MAIPF has not assigned the claim to a servicing insurer." *Michigan Head & Spine, et al v MAIPF,* ___ Mich App ___, ___; ___ NW2d ___ (2013) (Docket No. 344955); slip op at 8. To the extent that the MAIPF's position rests upon the idea that it is not an entity that may be sued, this recently published decision should put that argument to rest.

("whenever a priority question arises between two insurers, the preferred method of resolution is for one of the insurers to pay the claim and sue the other in an action of subrogation"). This has been the mechanism through which insurers who are presented with claims, but might not be the responsible carrier, could avoid 12% penalty interest under MCL 500.3142(4) and attorney fees under MCL 500.3148(1). See *U of M Regents v State Farm*, 250 Mich App 719, 737; 650 NW2d 129 (2002) ("when the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits").[2] See also *Bloemsma v Auto Club Ins Ass'n*, 174 Mich App 692, 697; 436 NW2d 442 (1989) (a "dispute of priority among insurers will not excuse the delay in making timely payment").

Here, Esurance paid on a very significant no-fault claim and later found evidence that the policy had been procured through fraud. (See Answer to Application, p 2.) Esurance obtained a judgment against both its insured and the injured person, declaring the policy "void *ab initio* for misrepresentation and fraud in the application for insurance." (Ex. 3 attached to Application, p 69a.)[3] With no existing policy, the injured person should have looked to redress from the MAIPF. Esurance paid on the basis of a mistake, no different than the more typical equitable subrogation scenario where a carrier pays and then discovers a higher-in-priority in the claimant's household, for example. Yet Esurance has been denied any remedy.

While the MAIPF claims that the decision has no jurisprudential consequences (Answer to Application, p v), cases discussed in Esurance's Application belie this. Michigan courts have repeatedly recognized that when a no-fault carrier mistakenly pays no-fault benefits, where another entity was obligated to pay the benefits in the first place, the insurer that has made the

[2] Overruled on other grounds by *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 203 n 24; 895 NW2d 490 (2017).
[3] See *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018).

payments has a claim for reimbursement in the form of subrogation. See *Fed Kemper Ins Co v W Ins Companies,* 97 Mich App 204, 208–09; 293 NW2d 765 (1980), finding that when an insurer "whose liability is arguably secondary to that of a primary insurer, pays the claim, it becomes subrogated to the rights of the insured." "Under these circumstances the Court held that a separate suit … is the preferable method of handling the dispute since the injured person recovers for his injuries without delay while the insurers thereafter iron out their respective liabilities." *Id.*

Equitable subrogation is "a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Auto-Owners Ins Co v Amoco Prod Co,* 468 Mich 53, 59; 658 NW2d 460 (2003). "The doctrine of subrogation rests upon the equitable principle that one, who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect." *Tel Twelve Shopping Ctr v Sterling Garrett Constr Co,* 34 Mich App 434, 439; 191 NW2d 484 (1971), quoting *French v Grand Beach Co,* 239 Mich 575, 580; 215 NW 13 (1927).

The MAIPF asserts that Esurance is not entitled to equitable subrogation because it paid as a "volunteer" (Answer to Application, p 1.) The Court of Appeals accepted this argument. (Id.) However, this argument fails to account for the fact that "[e]quitable subrogation is a flexible, elastic doctrine of equity." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). "Subrogation" denotes "two different kinds of rights, those that are transferred in effect by way of contractual assignment and those that arise by operation of law from the relations of various involved parties under equitable principles."

Citizens Ins Co of America v Buck, 216 Mich App 217, 225; 548 NW2d 680 (1996). Although caution is indicated, "the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability." *Hartford Accident & Indemnity*, 461 Mich at 216 (citation omitted). It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer." *Auto-Owners v Amoco*, 468 Mich at 59. However, "[w]hen an insurance provider pays expenses on behalf of its insured, it is not doing so as a volunteer." *Id.* (citation omitted).

Here, the Court of Appeals found that "[i]f the policy never existed" – again, because it was voided *ab inito* – "then plaintiff was a mere volunteer when it paid $571,000 in PIP benefits." *Esurance v MAIPF*, ___ Mich App at ___; slip op at 6. Not so. This Court has defined a "volunteer" as "one who intrudes himself into a matter which does not concern him, or one who pays the debt of another without request, when he is not legally or morally bound to do so, and when he has no interest to protect in making such payment." *DAIIE v Detroit Mut Auto Ins Co*, 337 Mich 50, 53-54; 59 NW2d 80 (1953). But a "payment is not voluntary when made under compulsion, under a moral obligation, in ignorance of the real state of facts, or under an erroneous impression of one's legal duty." *Id.* at 54. That is precisely what happened here – Esurance issued a policy and made payments based on "ignorance of the real state of facts" *because of the insured's material misrepresentations* in the application for insurance. (See Ex. 3 attached to Application, p 69a.) Again, the Macomb County Circuit Court declared the policy "void *ab initio* for misrepresentation and fraud in the application for insurance." (Id.) So at the time Esurance paid, it was ignorant of the "real state of facts" (that the policy was fraudulently procured and subject to rescission) and "under an erroneous impression" that it had a legal duty to cover Roshaun's PIP benefits. See *Fed Ins Co v Hartford Steam Boiler Inspection & Ins Co*,

415 F3d 487, 494–95 (CA 6, 2005). As such, Esurance "was not a volunteer, and its claim for equitable subrogation" should proceed. *Id*. at 495.

The Court of Appeals alternatively found that "under the circumstances that existed when benefits were paid, which was before the policy was rescinded," Esurance's claim fails "because Roshaun could not have pursued benefits from defendants under MCL 500.3172(1)." *Esurance v MAIPF,* ___ Mich App at ___; slip op at 6. *But this is a fundamental problem with every no-fault subrogation claim.* Again, the panel's reasoning fails to account for "flexible" and "elastic" nature of the remedy. *Hartford Accident & Indemnity,* 461 Mich at 215. In any subrogation suit for PIP benefits, the insurer has to pay in order to step into the shoes of the injured person and gain standing to sue the higher-in-priority insurer that the person should have looked to. But if the injured person's bills have been paid, then he theoretically has nothing to sue the other carrier for "under the circumstances" then existing. This is why equitable subrogation is referred to as a "legal fiction"; Michigan courts have historically looked past this in the no-fault context in order to achieve fairness and give protection to carriers that pay promptly and later find new information.

The MAIPF also argues that Esurance's claim should be dismissed because no provision of the No-Fault Act expressly authorizes such suits. (Answer to Application, pp 3-4.) Although the Court of Appeals did not decide the case on this basis, the argument warrants some attention because the trial court seemingly found it persuasive, and MAIPF again asserts it as an alternate basis for affirming. (Id.) This Court rejected a nearly identical argument in *Auto-Owners v Amoco,* 468 Mich at 63, a decision that the MAIPF wholly ignores. In *Auto-Owners v Amoco,* this Court "recognize[d] that the WDCA contains an 'exclusive remedy' provision applicable to the employee," but held that "its existence does not prevent plaintiff from seeking to recover

under a theory of equitable subrogation, which is separate and independent of the remedies contained in the WDCA." *Auto-Owners v Amoco,* 468 Mich at 63 (emphasis added). Equitable subrogation is, likewise, "separate and independent of the remedies contained" in the No-Fault Act. The critical inquiry is what remedies *Roshaun Edwards* would have had against the MAIPF. *Travelers Ins v U-Haul of Michigan, Inc,* 235 Mich App 273, 277 n 2; 597 NW2d 235 (1999). As noted, Roshaun gave timely notice to the MAIPF and therefore could have sued under MCL 500.3174.

In finding that no cause of action exists in these circumstances, the trial court erred by placing unwarranted emphasis on the canon of statutory construction known as *expressio unius est exclusio alterius*.[4] (Ex. 3 attached to Application, pp 7a, 10a, 15a.) Again, this is not an argument that the Court of Appeals adopted, but some discussion of it is necessary because the MAIPF continues to advance it. (Answer to Application, p 3.) The trial court reasoned that because the No-Fault Act expressly authorizes certain types of subrogation claims, but does not mention equitable subrogation claims against these Defendants, this reflects a legislative intent to bar such claims. (Ex. 3 attached to Application, pp 7a, 10a, 15a.) This is not only irreconcilable with this Court's reasoning in *Auto-Owners v Amoco,* 468 Mich at 63, but is also a misapplication of this canon. As the U.S. Supreme Court noted in *Barnhart v Peabody Coal Co,* 537 US 149, 168; 123 S Ct 748, 760 (2003), "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."

[4] "[T]he expression of one thing means the exclusion of another…." *Tuggle v Dept of State Police,* 269 Mich App 657, 663; 712 NW2d 750 (2005).

"The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Id.* (citations omitted). The rule "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." *Id.* (citations omitted).

Here, the No-Fault Act does not contain a list or grouping of subrogation claims. Rather, the MAIPF identified five discrete subparts, spread throughout the No-Fault Act. (Ex. 3 attached to Application, pp 23a-24a.) Those subparts – MCL 500.3115(2), MCL 500.3116(3), MCL 500.3146, MCL 500.3175(2), and MCL 500.3177(1) – each refer to distinct factual situations (except for § 3146, which establishes a statute of limitations for claims under § 3116) and there is no "natural association of ideas" between them, other than the extremely broad idea that they all relate to one party asking for money from another. The No-Fault Act contains no "associated group or series" of subrogation claims.

The doctrine of *expressio unius est exclusio alterius* "does not subsume the plain language of the statute when determining the intent of the Legislature." *Tuggle*, 269 Mich App at 664. It is "a rule of statutory interpretation meant to help ascertain the intent of the Legislature, and it does not automatically lead to results." *Id.* (citation omitted). In *Luttrell v Dept of Corr*, 421 Mich 93, 107; 365 NW2d 74 (1984), this Court found that the doctrine was simply inapplicable where the Legislature's intent was otherwise clear from, among other things, "the plain language of the statute" and "the rule of avoiding absurdity and unreasonableness…." That reasoning applies here, where (1) *Roshaun Edwards* had a cause of action against the MAIPF under MCL 500.3174, (2) there is no express prohibition of equitable subrogation claims in the

No-Fault Act, (3) the MAIPF's position would leave claimants without a remedy when the MAIPF refuses to assign their claims, contrary to the remedial purpose of the Act, and (4) this Court's reasoning in *Auto-Owners v Amoco,* 468 Mich at 63 suggests that equitable subrogation "is separate and independent of the remedies contained in" the statute. So the Court of Appeals correctly rejected the trial court's application of this doctrine. *Esurance v MAIPF*, ___ Mich App at ___; slip op at 4.

The MAIPF further argues that Esurance has no right to equitable subrogation based on *Qafleshi v Lincoln Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2018 (Docket No. 335835) (Answer to Application, pp 4-5.) *Qafleshi* supposedly demonstrates that "at the time of the Application [for no-fault benefits] with regards to Roshaun Edwards, there was no basis for liability as to an assigned carrier and therefore, Mr. Edwards did not, in fact, have the right to sue the MAIPF when the claim was made...." (Id., p 5.) But the *Qafleshi* opinion contains no reference to the subpart cited by Esurance, § 3174. The opinion also makes no reference to equitable subrogation.

To the extent any relevant rule of law can be drawn from this procedurally unusual unpublished decision, the MAIPF seems to cite it for the proposition that a claimant cannot sue the MAIPF to compel an assignment when there is another "applicable and identified" carrier. (Answer to Application, p 4.) While true as a general proposition, the argument begs the question[5] by presupposing that Esurance's policy *was not* voided ab initio in Esurance's suit against Luana Edwards-White. (Ex. 3 attached to Application, pp 31a, 69a.) "[W]hen a policy is rescinded, it is considered void ab initio and is considered *never to have existed*…." *Bazzi,*

[5] The "fallacy of begging the question … consists in taking for granted precisely what is in dispute, in passing off as an argument what is really no more than an assertion of your position." *Wilburn v Commonwealth*, 312 SW3d 321, 334 (Ky 2010) (Noble, J., dissenting).

502 Mich at 409 (citation omitted). The MAIPF acknowledges that the ramifications of Esurance's rescission action on this suit are "unclear." (Answer to Application, p 2 n 1.) Yet the trial court granted Defendants' motion under MCR 2.116(C)(8) without any consideration of that issue.

Finally, the MAIPF does not address the fact that even if Esurance had not rescinded the policy, Esurance simply did not fall within the order of priority for Roshaun's claim under a plain reading of MCL 500.3114. (Ex. 3 attached to Application, pp 55a-56a.) Esurance did not insure Roshaun, his spouse, or anyone residing in his household. The named insured under Esurance's *Colorado* policy was Luana Edwards-White – and there is no indication in the record that Roshaun lived with her at any times relevant to this claim. (See Id.) Since Esurance's insured did not reside in Roshaun's household, MCL 500.3114(1) did not place Esurance in the order or priority. So Roshaun's claim would fall to "[t]he insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a) (emphasis added). Again, "the owner or registrant of the vehicle occupied" was Anthony White II, and Esurance was not his insurer. This subpart is keyed to the *person* ("the insurer of the owner or registrant"), not the *vehicle*. See *Dobbelaere v Auto Owners,* 275 Mich App 527, 533-534; 740 NW2d 503 (2007). So we look next to MCL 500.3114(4)(b), "[t]he insurer of the operator of the vehicle occupied." Again, this was Roshaun, and Esurance was not his insurer.

The MAIPF did not dispute this in the trial court. (Ex. 3 attached to Application, pp 75a-78a.) This priority analysis confirms that Esurance paid Roshaun's claim in error and undeniably would have an equitable subrogation claim against the correct insurer, if one existed. See *Titan Ins v N Pointe Ins,* 270 Mich App 339, 343-344; 715 NW2d 324 (2006). The only thing different about this case is that there is no *insurer* for Esurance to sue. But that is because the MAIPF did

not assign an insurer. Recent case law is filled with examples of claimants suing the MAIPF to compel an assignment. (See Application, pp 9-10.) So some kind of cause of action clearly exists and dismissal with prejudice under MCR 2.118(C)(8) was, at best, premature.

CONCLUSION AND RELIEF REQUESTED

The lower courts erred in dismissing this action. Both the MAIPF and the lower courts fundamentally misapprehended the nature of equitable subrogation. While the No-Fault Act may not expressly endorse such a cause of action, that does not negate Esurance's claim. A "theory of equitable subrogation … is separate and independent of the remedies contained in the" Act. *Auto-Owners v Amoco*, 468 Mich at 63. The Court of Appeals' finding that Esurance was a volunteer is contrary to *DAIIE v Detroit Mut Auto*, 337 Mich at 53-54, as Esurance issued a policy and made payments based on "ignorance of the real state of facts" *because of the insured's material misrepresentations* in the application for insurance. And the Court of Appeals' alternative view, which focused on "the circumstances that existed when benefits were paid," threatens to remove equitable subrogation from no-fault jurisprudence entirely – eliminating this important mechanism for providing "assured, adequate, and prompt recovery" for losses "arising from motor vehicle accidents." See *St John Macomb-Oakland Hosp*, 318 Mich App at 267. For these reasons, Esurance respectfully requests that this Honorable Supreme Court grant this Application for Leave to Appeal or in the alternative, that this Court peremptorily reverse and remand to the Wayne County Circuit Court.

SECREST WARDLE

BY: _/s/Drew W. Broaddus_____
DREW W. BROADDUS (P 64658)
Attorney for Plaintiff-Appellee Esurance
(616) 272-7966 /dbroaddus@secrestwardle.com

Dated: February 27, 2020

5786710_2